

## FOREWORD

**Title:**

*The Anne, 16 U.S. 435 (1818): The Fate of Vessels Captured after the War of 1812*

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**Document Type:**

*Article*

**Publication Date:**

*November 25, 2013*

**Keywords:**

*1812, Anne, Baltimore, consul, D.B. Ogden, foreign affairs, Justice Story, neutral, neutrality, Privateer, prize law, Robert Goodloe Harper, Spain, St. Domingo, Treaty of Ghent, William Winder, Ultor*

**Abstract:**

*The War of 1812 officially ended in 1815 with the Treaty of Ghent, but many vessels were captured and condemned as prizes after the Treaty was ratified. One of those ships was The Anne. This paper describes The Anne's capture and analyzes it within its place in history. Particularly, it looks at the role of neutral nations during wartime, and the effect they had on prizes captured within their territory. Finally, it analyzes the legal aspects of the case, including the arguments and opinions and discusses the impact that The Anne had on principles of maritime law.*

**Disciplines:**

*Law, Legal History, Maritime History*

## The ANNE, 16 U.S. 435 (1818)

### The Fate of Vessels Captured after the War of 1812



**Figure 1 - This painting was created by Amédée Forestier in 1814**

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## I. INTRODUCTION

### A. PRIZE PRACTICE

The War of 1812 set the stage for a phenomenon of maritime law in which the seas were their own unique battleground, ripe with belligerent and allied ships, constantly patrolling to diffuse potential harm. During these excursions, ships were permitted to defend themselves, and in the course of such defense, they were permitted to capture enemy vessels and hold them.<sup>1</sup> These captured vessels were called "prizes."<sup>2</sup> The proceeds of a seized prize, which included the vessel, cargo, and ransomed prisoners, were ultimately given to the sovereign of the captor.<sup>3</sup>

In times of war, nations took extra steps to specifically outfit vessels for the sole purpose of capturing enemy prizes. These warships were essentially given a license to attack enemy vessels, in the form of a document identifying the ship's commission as a vessel of the national navy. Private parties also had the ability to partake in prize practice. There were generally two types of private vessels that engaged in prize practice. The first were merchant ships who engaged mainly in trade, and prize taking was ancillary to that purpose.<sup>4</sup> The second category included ships which were heavily armed and engaged solely in raiding enemy commercial ships.<sup>5</sup> They were issued documentation referred to as "letters of marque," which constituted the

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<sup>1</sup> DONALD A. PETRIE, *THE PRIZE GAME: LAWFUL LOOTING ON THE HIGH SEAS IN THE DAYS OF FIGHTING SAIL*, 2 (1999).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 4. As to be expected, these vessels were relatively slow, had a large carrying capacity, and were outfitted with a smaller crew.

<sup>5</sup> *Id.*

vessel as a privateer.<sup>6</sup> Privateers were motivated solely by financial expectations, and were not required to share the proceeds with their nation.<sup>7</sup>

Initially, the rules surrounding prize taking were unorganized, but they eventually grew into what became known as the maritime law of nations. While these laws helped control the conduct between nations, their reach only extended over the high seas.<sup>8</sup> Within each nation's boundaries, their municipal laws still operated to control the behavior of the nation's citizens and courts.<sup>9</sup> In the prize courts, the judge's role was to determine the validity of an enemy ship's capture. In the United States this power stemmed from Article 1 Section 8 of the Constitution, which granted Congress the power to regulate prizes, and Article 3 Section 2 granted the judiciary the power to sit as admiralty courts.<sup>10</sup> Prize courts attempted to carry out swift justice, particularly because the parties did not have the luxury of staying in port for a long time. To hasten the proceedings, courts would issue standard interrogatories or judicial questionnaires to the mariners and their answers would be recorded.<sup>11</sup> In addition, the ship's papers were given to the prize judge.<sup>12</sup> However, when this evidence raised questions about the capture that the judge could not clearly answer, further evidence was presented.<sup>13</sup> Generally, it took the form of sworn affidavits or oral testimony from crew members of both the captor and the prize.<sup>14</sup> The ultimate question in prize courts was a simple one: good or bad prize? If the judge could deduce an answer from the information stated above, the captive boat would either be released (bad prize)

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 3. Nations were willing to waive their interest, in order to incentivize private parties to make the necessary investments that ultimately aided the national war effort. *Id.*

<sup>8</sup> *Id.* at 30.

<sup>9</sup> *Id.* at 42.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 159.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 161.

<sup>14</sup> *Id.*

or sold (good prize).<sup>15</sup> This paper focuses on one prize case in particular, *The Anne*. The following section provides insight into the historical background and context leading up to the case.

## **B. HISTORICAL CONTEXT: THE WAR OF 1812 AND BEYOND**

The War of 1812 spanned over 32 months and took place between the United States and Great Britain.<sup>16</sup> Leading up to the war, Great Britain and France had been engaged in a bitter struggle for nearly twenty years.<sup>17</sup> During this time, the United States chose to remain neutral and its merchant ships continued to supply both nations.<sup>18</sup> Eventually, both Great Britain and France attempted to prevent the United States from trading with the other's enemy so they would be cut them off from vital supplies.<sup>19</sup> Great Britain passed various trade restrictions called Orders-in-Council, which sought to detain ships and goods bound for France or its colonies.<sup>20</sup> This increased United States tensions with Great Britain due to its negative effect on American commerce.<sup>21</sup> In conjunction with trade restrictions, Great Britain engaged in the practice of impressment, where British ships would stop and search commercial ships looking for sailors who they believed were deserters or British citizens.<sup>22</sup> These men were then forced to serve on behalf of the British. Records reflect that the British Royal Navy included somewhere around 6,000 men who claimed to be United States citizens.<sup>23</sup> The United States was also frustrated

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<sup>15</sup> This section was meant to provide a very brief interlude into prize practice and touch on just a few its many aspects.

<sup>16</sup> War of 1812, <http://www.history.com/topics/war-of-1812> (last visited Nov. 23, 2013).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Short History of the War of 1812, <http://www.usconstitutionmuseum.org/about-us/bicentennial/short-history-1812/> (last visited Nov. 23, 2013).

with British support of American Indians on the western frontier, who felt that they needed to defend their land from American invasion.<sup>24</sup> Ultimately, this led Congress to declare war against Great Britain on June 18, 1812.<sup>25</sup>

The War of 1812 was fought on land and at sea, particularly in the Atlantic and around the Gulf Coast.<sup>26</sup> British ships sought to protect their merchants who were trading in the West Indies and Nova Scotia, and to form blockades of American ports to cut off trade with the rest of the world.<sup>27</sup> The United States began to outfit ships to protect its own merchants, and American privateers hindered British trade by capturing their ships as prizes. Baltimore was one of the many ports known for outfitting these privateers. During the war, U.S. Naval warships engaged in single-ship combat with the British, resulting in many famous battles. On August 19, 1812, the USS *Constitution* engaged in a battle against the HMS *Guerriere*, and after a few minutes the *Guerriere's* masts were shot down and it plunged into the sea.<sup>28</sup> From this battle, the USS *Constitution* received its nickname, "Old Ironside," after a sailor witnessed a British shot bounce off the ship's hull.<sup>29</sup> On August 18, 1814, the Battle of Bladensburg occurred where the British marched on Washington, and tried to burn the White House and the Capitol.<sup>30</sup>

The War eventually came to an end when Great Britain and the United States signed the Treaty of Ghent.<sup>31</sup> The Treaty was signed by both parties on December 24, 1814, but it did not

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> USS *Constitution* Defeats the HMS *Guerriere*, <http://www.historycentral.com/1812/Constitution.html> (last visited Nov. 23, 2013).

<sup>29</sup> *Id.*

<sup>30</sup> Washington Burned, <http://www.historycentral.com/1812/Washington.html> (last visited Nov. 23, 2013).

<sup>31</sup> Treaty of Ghent, <http://www.historycentral.com/1812/Ghent.html> (last visited Nov. 23, 2013).

take effect until both Parliament and the Senate ratified it.<sup>32</sup> On December 30, 1814 Parliament ratified the Treaty, and on February 16, 1815 it was ratified by the United States Senate.<sup>33</sup> Due to the limited technology of the time, and because the war at sea took place in various areas across the globe, the drafters were conscious of the fact that news of peace would not reach everyone at once. To prevent disagreements about captures that occurred after ratification took place, the Treaty included a specific numbers of days after ratification during which captures would still be considered valid. The number of days varied depending on the area of the world in which the capture took place. For example, captures that took place in the West Indies were given thirty days after ratification, and captures that took place in any part of the world south of the equator were given ninety days.<sup>34</sup> Under the Treaty, both sides agreed that any vessels captured after the specified day limits were to be immediately restored.<sup>35</sup> The end result was that many vessels were captured and condemned as prizes even after peace had been restored between the two nations.<sup>36</sup>

## II. THE CASE

### A. CAPTURE AND INITIAL PROCEEDINGS

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Treaty of Ghent, <http://www.historycentral.com/documents/Ghent.html> (last visited, Nov. 23, 2013). The region known as the West Indies includes all of the islands in the Caribbean Sea from the northern coast of South America to the tip of the Florida peninsula. The Greater Antilles includes the following islands: Cuba, Jamaica, Haiti, the Dominican Republic, and Puerto Rico. WEST INDIES, <http://www.britannica.com/EBchecked/topic/640195/West-Indies> (last visited Nov. 24, 2013).

<sup>35</sup> *Id.*

<sup>36</sup> In 1815, the British Admiralty Court at Halifax addressed a somewhat similar situation where a British ship was captured by an American privateer on January 8, 1815 and then recaptured by a British ship on March 7, 1815. It was admitted by all sides that the vessel was captured before the Treaty's time limitations for captures expired, and was recaptured after that period. The court stated that by the capture, the American privateer acquired a legal right of possession, and the question was whether a lawful possession could be divested by a hostile force during a time of peace. The court held that "the restoration of peace annuls all modes of force; they become unlawful," and that "the right of possession in the captor was completed by the intervention of peace, and all right of recovering in the original owner was barred." Therefore, the captured vessel was returned to the American privateer. *Niles Register*, VIII: 328-239.



The *Anne* was captured on March 13, 1815 near the Spanish part of the island of St. Domingo.<sup>37</sup> As stated *supra*, the Treaty of Ghent provided that captures in the West Indies were valid up until thirty days after the ratification date of February 16, 1815. Thus, the capture of the *Anne* was still considered valid because it took place five days before the end of the thirty day limit. In 1815 the island of St. Domingo, now modern day Dominican Republic, was a colony owned by Spain.<sup>38</sup> After changing hands from Spain to Haiti, St. Domingo became the Dominican Republic when Juan Pablo Duarte formed a society known as La Trinitaria, whose main goal was to seek independence from Haiti without the help of foreign intervention.<sup>39</sup> Eventually, the Dominican Republic adopted its own constitution on November 6, 1844.<sup>40</sup>

The *Anne* was a British ship, with cargo belonging to a British subject named Richard Scott.<sup>41</sup> The *Anne* was captured by the privateer *Utor*, an American privateer out of the port of Baltimore.<sup>42</sup> The *Utor* was built in Baltimore in 1813 and was of the class Zebec, meaning she was a three masted vessel with a low, long hull and a large amount of overhang at the bow and stern.<sup>43</sup> This made the *Utor* slightly smaller but often faster than her victims.<sup>44</sup> The *Utor* was commanded by Captain James Matthews, and owned by Amos Williams, Andrew Clopper, Richard and William Gill, and James McCulloch.<sup>45</sup> Immediately subsequent to the capture, the master and the supercargo were put on shore at St. Domingo, while the rest of the crew was put

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<sup>37</sup> *The Anne*, 16 U.S. 435, 436 (1818).

<sup>38</sup> DOMINICAN REPUBLIC HISTORY: 1821-1916, [http://dr1.com/articles/history\\_1.shtml](http://dr1.com/articles/history_1.shtml) (last visited Nov. 24, 2013).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *The Anne*, 16 U.S. 435, 437 (1818). Despite many attempts, I was unable to locate any information on Mr. Scott.

<sup>42</sup> JOHN PHILIPS CRANWELL AND WILLIAM BOWERS CRANE, *MEN OF MARQUE*, 371-401 (1940).

<sup>43</sup> LEE BIENKOWSKI, *AN INTRODUCTION TO THE SHIPS OF THE AMERICAN REVOLUTION*, <http://www.continentalline.org/articles/article.php?date=9802&article=980202> (last visited Nov. 24, 2013).

<sup>44</sup> *Id.*

<sup>45</sup> JOHN PHILIPS CRANWELL AND WILLIAM BOWERS CRANE, *MEN OF MARQUE*, 371-401 (1940). For *Utor* owner biographies see *infra* Part III.B.

onto the privateer *Utor*.<sup>46</sup> The *Anne* was then taken to New York for adjudication, with the mate, carpenter, and the cook still on board.<sup>47</sup> In New York, the commissioner of prize took the deposition of the cook.<sup>48</sup> Shortly thereafter, the captors petitioned to have the *Anne* removed to the district court in Baltimore, pursuant to their rights under the Act of Congress on January 27, 1813.

**SEC. 5. And be it further enacted,** That the owner or owners of any private armed vessel or vessels, or their agent or agents, may, at any time before a libel shall be filed against any captured vessel or her cargo, remove the same from any port into which such prize vessel or property may be first brought, to any other port in the United States, to be designated at the time of the removal as aforesaid, subject to the same restrictions and complying with the same regulations with respect to the payment of duties, which are provided by law, in relation to other vessels arriving in port with cargoes subject to the payment of duties: *Provided,* that, before such removal, the said captured property shall not have been attached at the suit of any adverse claimant, or a claim against the same have been interposed in behalf of the United States.

**APPROVED, January 27, 1813.**

Captured vessels before libels filed may be removed.

**Provido.**

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This particular Act allowed captors to remove captured vessels from the port into which they were first brought, to any other United States port of their choosing, on the condition that no libels had been filed against the captured ships before removal.<sup>50</sup> The *Anne's* captors were from Baltimore, and since no libels had been filed they chose to have the case moved from New York to Baltimore to be heard by the district judge of the Maryland district.<sup>51</sup> Since the *Anne* was

<sup>46</sup> The *Anne*, 16 U.S. 436, 436 (1818).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA: FROM THE ORGANIZATION OF THE GOV. IN 1789 TO MARCH 3, 1845, VOLUME 2, 793 (1845), available at [http://books.google.com/books?id=\\_qhDAAAACAAJ&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q=that%20the%20owner%20or%20owners&f=false](http://books.google.com/books?id=_qhDAAAACAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q=that%20the%20owner%20or%20owners&f=false) (last visited Nov. 24, 2013).

<sup>50</sup> *Id.*

<sup>51</sup> Presumably, the owners felt that they were more likely to get a favorable outcome from the prize court of their home jurisdiction.

initially brought to New York, the commissioner of prize transmitted the cook's deposition and the ship's papers to the district judge of Maryland.<sup>52</sup>

Once in Baltimore, the prize proceedings began, and a claim was interposed on behalf of the Spanish consul.<sup>53</sup> In 1818, the Spanish consul in Baltimore was Juan Bautista Bernabeu.<sup>54</sup> Generally, a consul's job was to supervise and protect the commercial interests of foreign nationals in the receiving country.<sup>55</sup> The Spanish consul claimed restitution of the *Anne* to its rightful owner, on the ground that she was captured in violation of the neutral territory of Spain.<sup>56</sup> To clarify, Spain was considered neutral during the War of 1812, and the general rule with respect to neutral territory was that it was to be free from hostilities.<sup>57</sup> This included capturing prizes.<sup>58</sup> The allegation by the Spanish consul brought to light the question of whether the *Anne* was in neutral territory when she was captured. This issue had to be decided first, because if the capture took place outside of Spain's territory, the consul would have had no standing to interpose a claim for the *Anne*. To help make this determination, the court ordered that father proof be given by both sides.<sup>59</sup> As stated *supra*, prize cases were often adjudicated based on two pieces of evidence: the standard interrogatories or depositions from some members of the crew, and the ship's papers. From this information, judges were often able to decide the

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<sup>52</sup> *The Anne*, 16 U.S. 436, 436 (1818).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> CHARLES H. STOCKTON, *OUTLINES OF INTERNATIONAL LAW*, 220 (1914), *available at* [http://books.google.com/books?id=hJYGAAAAMAAJ&pg=PA399&lpg=PA399&dq=war+of+1812+protection+in+neutral+waters&source=bl&ots=xm5yC\\_4UMt&sig=5RXu-E4RGAHxJ9J3SHjpEsfDxpo&hl=en&sa=X&ei=IECBUvHBAo3esATQxYDYBA&ved=0CDcQ6AEwAjk#v=onepage&q=war%20of%201812%20protection%20in%20neutral%20waters&f=false](http://books.google.com/books?id=hJYGAAAAMAAJ&pg=PA399&lpg=PA399&dq=war+of+1812+protection+in+neutral+waters&source=bl&ots=xm5yC_4UMt&sig=5RXu-E4RGAHxJ9J3SHjpEsfDxpo&hl=en&sa=X&ei=IECBUvHBAo3esATQxYDYBA&ved=0CDcQ6AEwAjk#v=onepage&q=war%20of%201812%20protection%20in%20neutral%20waters&f=false) (last visited Nov. 24, 2013).

<sup>56</sup> *The Anne*, 16 U.S. 435, 436 (1818).

<sup>57</sup> STOCKTON, *supra* note 34 at 399.

<sup>58</sup> *Id.*

<sup>59</sup> *The Anne*, 16 U.S. 435, 436 (1818).

ultimate question of whether the prize was good or bad.<sup>60</sup> However, in situations where the circumstances of the capture remained unclear, the court could order that further proof be given, typically through oral testimony of both parties.<sup>61</sup> During the *Anne's* proceedings, the claimant was permitted to enter the testimony of the carpenter, and the *Utor's* captors were allowed to give their own testimony about the circumstances of the capture.<sup>62</sup> Upon hearing this evidence, the district court ultimately rejected the consul's claim, and condemned the *Anne* as good prize to the captors.<sup>63</sup>

The Spanish consul then appealed the case to the circuit court.<sup>64</sup> While on appeal, the British owner of the *Anne's* cargo, Mr. Richard Scott, interposed a claim for the property.<sup>65</sup> It is important to note that the policy during that time was such that nonresident aliens were not allowed to begin an action in any United States courts while a state of war existed between the United States and the alien's native country.<sup>66</sup> To prove his standing, the British owner asserted that after peace took place between the United States and Great Britain via the Treaty of Ghent, he was no longer considered an enemy belligerent.<sup>67</sup> Thus, he was once again allowed to sustain a suit within the United States judicial system.<sup>68</sup> The circuit court thereafter affirmed the district court's decree *pro forma*, or "as a matter of form."<sup>69</sup> This procedural device was common in situations where the circuit court wanted the Supreme Court to rule on the issues in the case

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<sup>60</sup> PETRIE, *supra* note 1, at 161.

<sup>61</sup> *Id.*

<sup>62</sup> *The Anne*, 16 U.S. 435, 436 (1818).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Kenneth Miller, *Enemy Aliens: Access to American Courts During Wartime*, 27 MARQ. L. REV. 225, 228 (1943), available at <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=3550&context=mulr> (last visited Nov. 24, 2013).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* <http://legal-dictionary.thefreedictionary.com/pro+forma> (last visited Nov. 23, 2013).

instead. The arguments from both sides were heard on March 5, 1818 and the Supreme Court delivered its opinion on March 7, 1818.

## **B. ARGUMENTS (IN ORDER OF FIRST APPEARANCE)**

### **1. Claimants**

Robert Goodloe Harper served as counsel for the Spanish consul and the British owner.<sup>70</sup> Harper's approach involved a two-pronged argument. First, he asserted that Spain, through the Spanish consul, had the right to interpose a claim for restitution of the property due to the fact that the *Anne* was captured within neutral territory. The second prong was that the British owner, through the intervention of the Treaty of Ghent, re-gained standing to interpose a claim for title to the property, and because the capture of property in neutral territory was void, he had a right to restitution of his property.

To prove the first prong of his argument, Harper had to convince the Court that the *Anne* was captured within neutral territory. As stated *supra*, there was much confusion about the circumstances of the capture, which forced the Court to hear oral testimony from the carpenter and the captors. Specifically, the carpenter and cook asserted that the capture took place within one mile from the shore of the island.<sup>71</sup> The testimony of the captors asserted that the capture took place about four to five miles from shore.<sup>72</sup> In admiralty law, territorial waters were marked as those within the range of a large cannon-shot from shore, a theoretical distance of approximately three miles.<sup>73</sup> As a practical matter, the cannon-shot was used as the neutral

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<sup>70</sup> *Id.* at 437. For Harper's biography *see infra* Part III.C.

<sup>71</sup> *The Anne*, 16 U.S. 435, 444 (1818).

<sup>72</sup> *Id.*

<sup>73</sup> HENRY J. BOURGUIGNON, SIR WILLIAM SCOTT, LORD STOWELL: JUDGE OF THE HIGH COURT OF ADMIRALTY, 1798-1828, 173 (1987) *available at* <http://books.google.com/books?id=J6orfRyCryUC&pg=PA173&lpg=PA173&dq=prize+cases+neutral+territorial+limits+cannon+range&source=bl&ots=-rmYAK9D->

marker because neutral territories could only protect themselves and those within their territory as far as their longest guns could reach. To negate the captor's testimony, Harper argued that the captors should not have been allowed to testify at all because their testimony was biased in their favor.<sup>74</sup> Excluding the testimony of the captors would have left the testimony uncontradicted that the capture occurred within neutral territory.

Standing alone, this fact was not enough to solidify the Spanish consul's position. As stated *supra*, the Spanish consul's job was to assist Spanish citizens living in the United States with any issues that were brought to him. This power, however, did not automatically give him the right to bring a claim for a grievance against Spain itself. To prove that the consul's position gave him sufficient authority to interpose a claim on behalf of Spain, Harper used the circumstances surrounding Spain during that time as a basis for his argument. From 1815 to about 1821, King Ferdinand VII held power in Spain, and his goal was to return the government to an absolutist monarchy.<sup>75</sup> This caused a great deal of resentment among the locals, nationalists, and liberals, and ultimately led to many uprisings and rebellions.<sup>76</sup> The turmoil in Spain during these years diverted their attention from foreign affairs and prevented the United States from receiving a new minister from Spain. His role would have included asserting claims on behalf of his sovereign.<sup>77</sup> Using this situation to his advantage, Harper argued that because the consul was the only foreign official present, he was automatically endowed with the power to

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3&sig=QrmmkCUZP1UqgnE0BNrrIO7DoA&hl=en&sa=X&ei=Rgl4UsaGG8rlsAS58oDIBA&ved=0CCwQ6AEwAQ#v=onepage&q=prize%20cases%20neutral%20territorial%20limits%20cannon%20orange&f=false (last visited Nov. 23, 2013).

<sup>74</sup> *The Anne*, 16 U.S. 435, 437 (1818).

<sup>75</sup> DOMINICAN REPUBLIC HISTORY: 1821-1916, [http://dr1.com/articles/history\\_1.shtml](http://dr1.com/articles/history_1.shtml) (last visited Nov. 24, 2013).

<sup>76</sup> *Id.*

<sup>77</sup> *The Anne*, 16 U.S. 435, 437 (1818).

assert a claim on behalf of Spain.<sup>78</sup> To support this proposition, Harper cited to an English case where a Portuguese consul was permitted to interpose a claim on behalf of his country absent any evidence showing he received special authority to do so.<sup>79</sup>

For the second prong of his argument, Harper addressed the issue of the British owner's standing, and his right to claim his property. The obstacle for Harper was that Great Britain changed from a belligerent to a non-belligerent during the course of the *Anne's* prize proceedings, and it was unclear how that affected the British owner's ability to assert a claim for his property. Harper argued that when the Treaty of Ghent established peace between Great Britain and the United States, the British owner's standing was rehabilitated, and he was once again permitted to avail himself of the American courts to claim title to his property.<sup>80</sup>

## **2. Captors**

D.B. Ogden and William Winder argued the case on behalf of the captors.<sup>81</sup> Ogden was a New York lawyer, and Winder was a Baltimore lawyer. It is unclear from the case how these lawyers came to argue the case together. One theory is that when the *Anne* was initially taken to New York, D.B. Ogden became involved on behalf of the captors and when the case was transferred to Baltimore he stayed on as co-counsel with Winder.

The first portion of co-counsel's argument involved attacking Spain's standing by proving that the capture did not occur in neutral territory and that the Spanish consul lacked authority to bring a claim. They asserted, as a procedural matter, that the captor's testimony was admissible

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<sup>78</sup> *Id.* at 438.

<sup>79</sup> The English case Harper cited was the *Vrow Anna Catharina*. Despite many research attempts, I was unable to locate the case or its contents.

<sup>80</sup> *Id.* at 438.

<sup>81</sup> For Ogden's biography *see infra* Part V.A. For Winder's biography *see infra* Part III.D.

because it was given upon an order for further proof.<sup>82</sup> As part of a policy argument, they contended that such testimony was particularly relevant and necessary in cases alleging violations of neutral territory because the circumstances of the capture become a critical issue.<sup>83</sup> In those instances, it would be necessary to gather information from every available source, and the captors would have as much knowledge about the circumstances of capture as the captured persons.<sup>84</sup>

The second portion claimed that even if the capture occurred in neutral territory, thus giving Spain the right to interpose a claim, the Spanish consul himself lacked the proper authority. They argued that a consul was only a commercial agent, without the diplomatic attributes or privileges of an ambassador, so he must "be specially empowered to interpose the claim, in order that the court may be satisfied that it comes from the offended government."<sup>85</sup>

In the third part of their argument, Winder and Ogden made more substantive claims about neutrality itself, and what was expected from a neutral nation in times of war. The concepts of neutrality and neutral rights were of vital importance to the United States before, during and after the war. As stated *supra*, one of the causes of the War of 1812 was Great Britain's violations of American neutrality through constant impressments of American citizens and implementation of embargoes to halt American trade. Additionally, neutral nations played a vital role during wartime by preventing belligerents from violating neutral rights and the rights extended to those within the protection of the neutral territory.<sup>86</sup> To be truly effective, the neutral nation was expected to intervene, either by force or within the courts, whenever it

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<sup>82</sup> *The Anne*, 16 U.S. 435, 438 (1818).

<sup>83</sup> *Id.* at 438-439.

<sup>84</sup> *Id.* at 439.

<sup>85</sup> *Id.*

<sup>86</sup> STOCKTON, *supra* note 34.



became aware of such violations.<sup>87</sup> Based upon this principle, Winder and Ogden attacked Spain's neutrality, and alleged that towards the latter end of the War of 1812, Spain allowed British hostilities to commence within her territory and her neutrality was "violated with impunity" on a number of occasions.<sup>88</sup> They asserted these actions were enough to strip Spain of its neutral status, effectively revoking Spain's right to intervene between the belligerent nations.<sup>89</sup>

The final portion of the captors' argument addressed the rights of belligerent nations as it pertained to captures in neutral territory. They stated, "Every capture of enemy's property, wheresoever made, is valid, *prima facie*; and it rests with the neutral government to interfere, where the capture is made within the neutral jurisdiction."<sup>90</sup> The result would have left the British owner without standing to bring a claim for his property or for any other purpose, because Spain, the neutral authority, was the only one with standing to assert a claim. Further still, they asserted that where the enemy commences the first attack within the neutral area, he may be resisted and captured.<sup>91</sup>

Finally, Winder and Ogden claimed that the captors' right to the property was solidified by the fact that the Treaty of Ghent had the effect of "quieting all titles of possession arising out of the war."<sup>92</sup> As support, co-counsel cited to Wheaton on Capture, reproduced below.

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<sup>87</sup> *Id.*

<sup>88</sup> *The Anne*, 16 U.S. 435, 440 (1818).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 439.

<sup>91</sup> *Id.* at 441.

<sup>92</sup> *Id.*

The restoration of the conquered territory to its original sovereign, by the treaty of peace, carries with it the restoration of all persons and things which have been temporarily under the enemy's dominion, to their original state. This general rule is applied, without exception, to real property or immovables. The title acquired in war to this species of property, until confirmed by a treaty of peace, confers a mere temporary right of possession. The proprietary right cannot be transferred by the conqueror to a third party, so as to entitle him to claim against the former owner, on the restoration of the territory to the original sovereign. If, on the other hand, the conquered territory is ceded by the treaty of peace to the conqueror, such an intermediate transfer is thereby confirmed, and the title of the purchaser becomes valid and complete. In respect to personal property or movables, a different rule is applied. The title of the enemy to things of this description is considered complete against the original owner after twenty-four hours' possession, in respect to booty on land. The same rule was formerly considered applicable to captures at sea; but the more modern usage of maritime nations requires a formal sentence of condemnation as prize of war, in order to preclude the right of the original owner to restitution on payment of salvage. But since the *jus postliminii* does not, strictly speaking, operate after the peace, if the treaty of peace contains no express stipulation respecting captured property, it remains in the condition in which the treaty finds it, and is thus tacitly ceded to the actual possessor. The *jus post-*

Effect of restoration of territory by a treaty of peace.

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According to the treatise, the most current maritime law required a formal sentence of condemnation of property as a prize before the original owner was precluded from asserting ownership over it. This exemplified the principle that after war people regain the rights to things that belonged to them before capture. The caveat, however, was that because this principle does not operate after the peace, if the treaty itself makes no provision for the disposition of captured property, it remains in the condition in which it is found, i.e. the actual possessor retains title. Winder and Ogden explained that since the *Anne* and her cargo were in the captor's control in New York when the Treaty took effect, they were the actual possessors and should retain title to the property.

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<sup>93</sup> HENRY WHEATON, WHEATON'S ELEMENTS OF INTERNATIONAL LAW, 807 (1817), available at [http://books.google.com/books?id=z6ysAAAAMAAJ&pg=PA807&lpg=PA807&dq=Wheaton+treaties+of+peace+and+title&source=bl&ots=cJBXASJeAx&sig=UNh2jY9I6\\_s3DRBOfqCo3OPUxg0&hl=en&sa=X&ei=dCJ1UtmmD8vMsQTurICYBA&ved=0CCkQ6AEwAA#v=onepage&q=Wheaton%20treaties%20of%20peace%20and%20title&f=false](http://books.google.com/books?id=z6ysAAAAMAAJ&pg=PA807&lpg=PA807&dq=Wheaton+treaties+of+peace+and+title&source=bl&ots=cJBXASJeAx&sig=UNh2jY9I6_s3DRBOfqCo3OPUxg0&hl=en&sa=X&ei=dCJ1UtmmD8vMsQTurICYBA&ved=0CCkQ6AEwAA#v=onepage&q=Wheaton%20treaties%20of%20peace%20and%20title&f=false) (last visited Nov. 24, 2013).

Harper then countered Winder and Ogden's arguments that the Spanish consul had the authority to interpose a claim for his government. He also cited to the same case, but argued that it did not appear any proof was given to the court to suggest that the Portuguese consul was specifically instructed by his sovereign to make the claim.<sup>94</sup> Next, Harper attempted to take opposing counsels' allegations about Spain's neutrality out of the Court's hands by employing a separation of powers argument. He asserted that foreign relations issues were within the jurisdiction of the executive and legislative branches, and that at no point had they decided that a neutral nation's partial actions could forfeit her right to be considered a neutral state in the eyes of the courts.<sup>95</sup> With this argument, Harper may have been attempting to play to Justice Story's personal constitutional beliefs.<sup>96</sup>

While both sides seemed to agree that the captured vessel attacked first, Harper claimed that "Resistance to search does not always forfeit the privileges of neutrality; it may be excused under circumstances of misapprehension, accident, or mistake."<sup>97</sup> He asserted that the *Anne's* resistance was a premature defense, as pirates were known to frequent those areas.<sup>98</sup> Additionally, Harper argued that because the *Anne* was in neutral territory, not on the high seas,

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<sup>94</sup> *The Anne*, 16 U.S. 435, 442 (1818).

<sup>95</sup> *Id.*

<sup>96</sup> In his 1833 book *Commentaries on the Constitution of the United States*, Justice Story said, "[The separation of powers doctrine] is not meant to affirm, that the [three branches of government] must be kept wholly separate and distinct, and have no common link or connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands, which possess the whole power of either of the other departments....[A]s a corollary, that, in reference to each other, neither of them out to possess, directly or indirectly, an overruling influence in the administration of their respective powers." J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 525 (1833).

<sup>97</sup> *Id.* at 443.

<sup>98</sup> Specifically, Carthaginian rovers.

she was entitled to the privileges of a neutral which meant a right of search did not exist.<sup>99</sup> Thus, any attempt to exercise a search may be lawfully resisted.

As a counter to the captors' argument that title belongs to the actual possessor, Harper asserted that a treaty of peace only settled title to property when it had been condemned by a court to be valid or invalid.<sup>100</sup> At that point, the property had not yet been condemned, and was only in possession of the captors, so the treaty would not have settled title to the property. Therefore, the British owner had a right to interpose a claim for the property at any time "before the final sentence of condemnation."<sup>101</sup>

#### **D. OPINION OF THE COURT**

On March 7th 1818, Justice Story delivered the court's opinion, which ultimately condemned the *Anne* as good prize, in favor of the captors. To begin, Justice Story addressed whether the capture was made in neutral territory. He explained the rules of evidence in prize proceedings generally, and clarified that in situations where there is an order for further proof, the captors' testimony would clearly be admissible evidence.<sup>102</sup> Justice Story reasoned that when the circumstances of the capture become a material issue to the case, both the captors and captured have knowledge of the facts, and the bias towards these facts is just as strong for one side as it is for the other.<sup>103</sup> Justice Story also distinguished evidentiary rules in prize proceedings from other types of litigation by stating that the common law doctrine of competency did not apply to prize proceedings.<sup>104</sup> Early on, the common law rules of evidence were heavily influenced by religion, and this resulted in many rules designed to prevent

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<sup>99</sup> *Id.* at 443.

<sup>100</sup> *Id.* at 443-444.

<sup>101</sup> *Id.* at 444.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 445.

<sup>104</sup> *Id.*

perjury.<sup>105</sup> One such rule prevented the admission of testimony from any witness with interest in the case because it was assumed they would have a strong motive to lie.<sup>106</sup> Despite this distinction, Justice Story clarified that the testimony was subject to the usual evidentiary exceptions like credibility.<sup>107</sup> Without going into detail, Justice Story opined that the weight of the evidence showed that the capture "was made within the territorial limits of Spanish St. Domingo."<sup>108</sup>

Upon declaring that the capture took place within neutral territory, Justice Story continued by addressing the Spanish consul's standing. Justice Story opined that the consul only carried authority for commercial purposes, "and is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with the authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives."<sup>109</sup> Justice Story also stated that while a sovereign is allowed to specially entrust a consul with such authority, there was no evidence in this case that the requisite authority was delegated to the Spanish consul. As a result, Justice Story dismissed the consul's claim for lack of standing.<sup>110</sup>

After disposing of the Spanish consul's claim, Justice Story moved on to address whether the British owner could assert any title to the *Anne's* cargo. First, he stated that the British owner

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<sup>105</sup> "The early common law rules of evidence were heavily influenced by religious law. One manifestation of that influence was the large number of rules designed to insure that perjury would not be committed. It was as if the courts took a moral responsibility for perjury committed by others in a trial. Consequently, rules of evidence were developed to keep perjury from occurring in court. One such set of rules, for example, related to the competency of witnesses and was designed to exclude as a witness anyone with an interest in the case and consequently, with a motive to lie." COMPETENCE OF WITNESSES, *available at* <http://www.law.wisc.edu/evidence/ch02.html> (last visited Nov. 23, 2013).

<sup>106</sup> *Id.*

<sup>107</sup> *The Anne*, 16 U.S. 435, 445 (1818).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 446.

<sup>110</sup> *Id.*

did have standing to bring a suit for the property because the Treaty of Ghent rehabilitated his right to bring a claim in an American court.<sup>111</sup> Despite this fact, Justice Story clarified that the British owner's standing was limited to a claim for the property, and it would not allow him to assert a claim that the capture itself was void.<sup>112</sup> This distinction stemmed from the circumstances of the capture itself, because Great Britain and the United States were still considered belligerents at that time. To address the validity of the capture, Justice Story applied the well-established principle that, "A capture made within neutral waters is, as between enemies, to all intents and purposes, rightful; it is only by the neutral sovereign that its legal validity can be called into question; and as to him and him only, is it to be considered void."<sup>113</sup> This meant that if the neutral nation chose not to interpose a claim, the property would have been condemnable to the captors.

From there, Justice Story propounded a principle of neutrality that *The Anne* is often cited for. First, Justice Story reiterated the fact that all parties admitted that the captured ship first commenced hostilities against the privateer.<sup>114</sup> He explained that in neutral territory, both ships were equally entitled to neutral protection, and were bound to abstain from all hostilities, except in self defense.<sup>115</sup> Justice Story stated that this rule was to be strictly observed, and the *Anne* would not be excused even if the evidence clearly showed that she thought the privateer was a pirate ship.<sup>116</sup> Incident to the protection of neutral waters was the fact that the privateer was not required to show its colors and identify its character as it approached the coast.<sup>117</sup> Therefore,

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 447.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 448.

when the *Anne* commenced hostilities against the privateer, she forfeited her right to neutral protection, and neither she nor the foreign nation had a right to seek redress for the capture.<sup>118</sup>

Upon these findings, the Court unanimously condemned the *Anne* as a good prize of war to the captors.<sup>119</sup> However, there was one portion of the opinion that was very much shrouded in mystery. At the end of the opinion, Justice Story addressed the question whether the captors had conducted themselves in such a way that they forfeited their rights to the prize. Justice Story first laid out the general types of conduct that would require forfeiture, which included gross misconduct or laches, or instances of gross irregularity or fraud. However, he noted that irregularities from mistake or negligence that caused no real harm and were the result of good faith would not lead to such consequences. Justice Story then stated that there were some irregularities in *The Anne*, but he did not go into explicit detail as to what those irregularities were. Instead, Justice Story concluded by stating, "there is no evidence upon the record from which we can infer that there was any fraudulent suppression or any gross misconduct inconsistent with good faith."<sup>120</sup> One theory is that the "irregularities" Justice Story refers to are the fact that the master and supercargo were put on shore at St. Domingo after the *Anne* was captured. In the average prize case, the master and supercargo were the individuals whose interrogatories the court wanted first. As part of their jobs, they knew where the ship was headed, what kind of cargo the ship contained and where it was bought and sold, and other day to day information. Since depositions from these individuals were so customary, it certainly begs the question as to why they were left behind.

### **III. INTERESTED PARTIES**

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 448-449.

### **A. JUAN BAUTISTA BERNABEU**

Juan Bautista Bernabeu was born in Valencia, Spain and married Maria Bernabeu.<sup>121</sup> Mr. Bernabeu was the catholic assistant quarter-master of the Navy, and eventually became the consul general of Spain in the United States.<sup>122</sup> He died in Philadelphia on September 3, 1834.<sup>123</sup> During his career, he was very active in investigating and protecting the interests of Spanish foreign nationals in Baltimore. Evidence of this includes a letter from Juan Bernabeu to James Monroe, then Secretary of State under President James Madison, discussing Spain's intervention to help release United States citizens detained on the island of St. Martha.<sup>124</sup> Additionally, the Madison papers include a letter from Carlos Martinez de Irju who the Spanish minister to the United States during that time.<sup>125</sup> The letter to Madison discussed the American brigantine *Augusta*, how Juan Bernabeu believed that she was actually the Spanish ship *St. Peter*, and how United States customs officials were uncooperative when the consul brought his concerns to their attention.<sup>126</sup>

### **B. OWNERS OF THE PRIVATEER *ULTOR***

As stated previously, the owners of the privateer *Utor* included Amos Williams, Andrew Clopper, Richard and William Gill, and James McCulloch. Amos Williams invested heavily in

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<sup>121</sup> Find A Grave, <http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GRid=82401217> (last visited Nov. 23, 2013).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Letter from Juan Bautista Bernabeu to James Monroe, (Aug. 29, 1813), in THE PAPERS OF JAMES MADISON, PRESIDENTIAL SERIES, vol. 6 (Angela Kreider, J.C.A. Stagg, Jeanne Kerr Cross, Anne Mandeville Colony & Mary Parke Johnson eds. 2008) available at <http://founders.archives.gov/documents/Madison/03-06-02-0554> (last visited Nov. 23, 2013).

<sup>125</sup> Letter from Carlos Martinez de Irju to James Madison, (Jan. 27, 1803) in THE PAPERS OF JAMES MADISON, SECRETARY OF STATE SERIES, vol. 4 (Mary A. Hackett, J.C.A. Stagg, Jeanne Kerr Cross, Susan Holbrook Perdue & Ellen J. Barber eds. 1998) available at <http://founders.archives.gov/documents/Madison/02-04-02-0340> (last visited Nov. 23, 2013).

<sup>126</sup> *Id.*



Baltimore privateers during the war of 1812 with James Williams and Levi Hollingsworth.<sup>127</sup>

One such privateer was the schooner *Lynx*, which was built during the opening days of the War of 1812 and known for its innovative ship design.<sup>128</sup> Amos Williams and Andrew Clopper invested in a number of other privateers together, including: *Arab*, *Diamond*, *Globe*, *Grampus*, *Patapsco*, *Phaeton*, and the *Transit*.<sup>129</sup> The two were also involved in Baltimore's development, as evidenced by a record in the Chancery Court from February 19, 1813 indicating the men were part of a group who petitioned to condemn Hollingsworth Dock so they could extend Pratt Street.<sup>130</sup>

James W. McCulloch was born in Philadelphia, Pennsylvania in 1789 to John McCulloch and Anne Todd.<sup>131</sup> He married Abigail Sears and the couple had ten children.<sup>132</sup> Sources also indicate that McCulloch was a Baltimore customs collector.<sup>133</sup>

Later in life, McCulloch became the infamous cashier of the Baltimore branch of the Second National Bank of the United States who refused to pay the tax imposed by Maryland.<sup>134</sup> This resulted in the landmark case of *McCulloch v. Maryland*, where Chief Justice John Marshall

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<sup>127</sup> GEOFFREY M. FOOTNER, *TIDEWATER TRIUMPH: THE DEVELOPMENT AND WORLDWIDE SUCCESS OF THE CHESAPEAKE BAY PILOT SCHOONER*, 111 (1998) *available at* [http://books.google.com/books?id=M7a5mqVBo1YC&pg=PA111&lpg=PA111&dq=Amos+Williams+and+Levi+Hollingsworth&source=bl&ots=tX5Dp4gP25&sig=KJ6\\_vhP-iHUHHaDbOwtPdwRj95s&hl=en&sa=X&ei=-YeTUpa1MojWoATgpoGAAQ&ved=0CC8Q6AEwAQ#v=onepage&q=Amos%20Williams%20and%20Levi%20Hollingsworth&f=false](http://books.google.com/books?id=M7a5mqVBo1YC&pg=PA111&lpg=PA111&dq=Amos+Williams+and+Levi+Hollingsworth&source=bl&ots=tX5Dp4gP25&sig=KJ6_vhP-iHUHHaDbOwtPdwRj95s&hl=en&sa=X&ei=-YeTUpa1MojWoATgpoGAAQ&ved=0CC8Q6AEwAQ#v=onepage&q=Amos%20Williams%20and%20Levi%20Hollingsworth&f=false) (last visited Nov. 23, 2013).

<sup>128</sup> WILLIAM H. WHITE, *THREE SCHOONERS NAMED LYNX*, <http://www.privateerlynx.com/history.html> (last visited Nov. 23, 2013).

<sup>129</sup> CRANWELL & CRANE, *supra* note 22.

<sup>130</sup> MARYLAND STATE ARCHIVES, *CHANCERY COURT (CHANCERY PAPERS) 1813-1814*, <http://msa.maryland.gov/msa/stagser/s500/s512/html/s5121.html> (last visited Nov. 23, 2013).

<sup>131</sup> Obtained from a search for "James W. McCulloch" using <http://www.ancestry.com>.

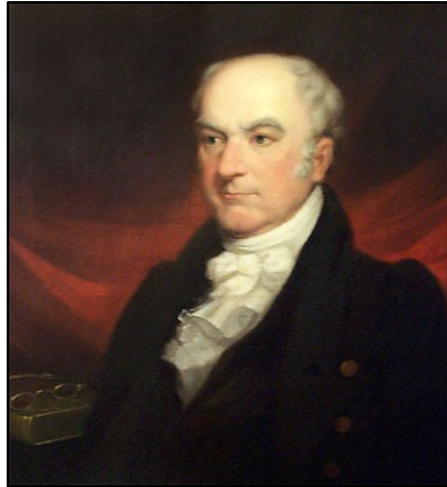
<sup>132</sup> *Id.*

<sup>133</sup> MARYLAND HISTORICAL SOCIETY, *BALTIMORE CUSTOMS HOUSE COLLECTION 1767-1816*, <http://www.mdhs.org/findingaid/baltimore-customs-house-collection-1767-1816-ms-806> (last visited Nov. 23, 2013).

<sup>134</sup> *MCCULLOCH v. MARYLAND*, The Oyez Project at IIT Chicago-Kent College of Law, [http://www.oyez.org/cases/1792-1850/1819/1819\\_0](http://www.oyez.org/cases/1792-1850/1819/1819_0) (last visited November 24, 2013).

concluded that the Federal government had the power to create a Federal bank and that the states did not have the power to tax it.<sup>135</sup>

### C. ROBERT GOODLOE HARPER - ATTORNEY FOR THE CLAIMANTS



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Robert Goodloe Harper was one of the most prominent attorneys of his time. Born January 1765 near Frederickstown, Virginia, Harper was educated at the College of New Jersey, now known as Princeton University, and went on to study law in Charleston, South Carolina.<sup>137</sup> Harper married Catherine ("Kitty") Carroll, daughter of wealthy landowner Charles Carroll of Carrollton, and the couple had six children.<sup>138</sup>

During his career, Harper served as a member of the South Carolina House of Representatives from 1790-1795.<sup>139</sup> He moved on to serve for the United States House of Representatives from 1795-1801.<sup>140</sup> After an unsuccessful re-election, Harper relocated to

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<sup>135</sup> *Id.*

<sup>136</sup> Photo available at <http://ececarr1987.pixnet.net/blog/post/175683479-download-robort-goodloe-harper> (last visited Nov. 23, 2013).

<sup>137</sup> MARYLAND STATE ARCHIVES, <http://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/002000/002031/html/02031bio.html> (last visited Nov. 23, 2013).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

Baltimore to begin his law practice.<sup>141</sup> During the War of 1812, Harper attained the rank of major general.<sup>142</sup> Harper was later elected to the U.S. Senate from Maryland, served from February 5 until December 6, 1816, and resigned before completing his term.<sup>143</sup> As stated *supra*, he was an unsuccessful candidate for Federalist vice president in 1816.

Harper argued many cases in the Supreme Court. Interestingly, a survey of those cases show that Harper almost always argued on behalf of the captured ship. Justice Story is said to have described him as "diffuse, but methodical and clear. He argues with considerable warmth, and seems to depend upon the deliberate suggestions of his mind. I am inclined to think he studies his cases with great diligence, and is to be considered as in some degree artificial."<sup>144</sup>

Four years after *The Anne*, Harper continued his legal relationship with the Spanish consul when he represented him in the prize case *The Santa Maria*, where it was alleged that the cargo of a Spanish ship was seized by an illegally outfitted privateer.<sup>145</sup>

#### **D. WILLIAM WINDER - ATTORNEY FOR THE CAPTORS**

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> SOMMERVILLE, *supra* note 94, at 39.

<sup>145</sup> *The Santa Maria*, 20 U.S. 490 (1822).



146

Winder's full name was William Henry Winder. He was born on February 8, 1775 in Somerset County Maryland.<sup>147</sup> He was educated at the University of Pennsylvania and studied law with John Henry and Gabriel Duvall.<sup>148</sup> Winder was a member of the Federalist party, like both Ogden and Harper.

Despite his legal career, Mr. Winder's claim to fame arose during the War of 1812 when he was appointed as a brigadier general.<sup>149</sup> Winder was charged with securing troops for Washington upon learning of the British plans to attack it, but they were late and Washington was almost burned.<sup>150</sup> After the war, Winder returned to his legal practice, but was never quite able to live down his performance during the war. Winder died in Baltimore City on May 24, 1824.<sup>151</sup>

#### **E. JUSTICE STORY - UNITED STATES SUPREME COURT**

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<sup>146</sup> Photo available at <http://listfave.com/top-10-worst-leaders-in-military-history/> (last visited Nov. 23, 2013).

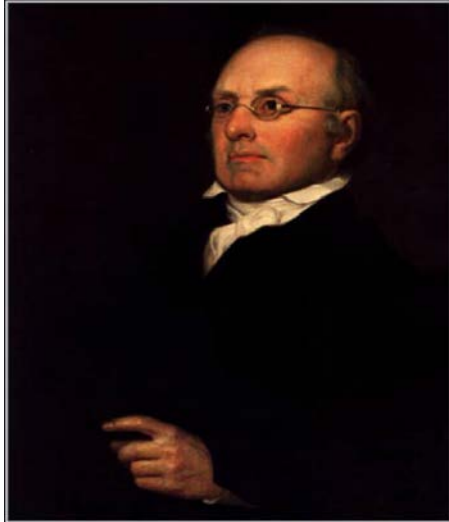
<sup>147</sup> MARYLAND STATE ARCHIVES, <http://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/014000/014074/html/14074bio.html> (last visited Nov. 23, 2013).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*



152

Joseph Story was born on September 18, 1779 in Marblehead, Massachusetts.<sup>153</sup> His father was Dr. Elisha Story, a member of the Sons of Liberty who took place in the Boston Tea Party.<sup>154</sup> Joseph Story graduated from Harvard in 1798 and was admitted to the bar in 1801.<sup>155</sup> He had a lucrative political career as a member of the state legislature, Congress, and as the Speaker of the Massachusetts House of Representatives.<sup>156</sup> In November of 1811, he was appointed to the Supreme Court at age 32 by James Madison.<sup>157</sup>

Justice Story had a monumental impact on the evolution of American law, both through his decisions and through the volumes of commentary he wrote on various branches of law. Justice Story is also known for his many contributions to admiralty and prize law. He championed for expansion of federal jurisdiction to all admiralty cases, used his judiciary discretion to expand the rights of seamen, and tried to promote a system of regularity and

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<sup>152</sup> COLLECTION OF THE SUPREME COURT OF THE UNITED STATES, [http://www.senate.gov/artandhistory/history/common/image/MA\\_Story\\_Joseph.htm](http://www.senate.gov/artandhistory/history/common/image/MA_Story_Joseph.htm) (last visited Nov. 23, 2013).

<sup>153</sup> SUPREME COURT HISTORY: BIOGRAPHIES OF THE ROBES, [http://www.pbs.org/wnet/supremecourt/personality/robes\\_story.html](http://www.pbs.org/wnet/supremecourt/personality/robes_story.html) (last visited Nov. 23, 2013).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

uniformity.<sup>158</sup> He served on the Supreme Court for 34 years, and despite being appointed by a Republican president, Justice Story aligned his beliefs with those of Justice Marshall, a staunch federalist.<sup>159</sup>

In addition to his position as a Supreme Court Justice, Joseph Story taught at Harvard Law School from 1829 to 1845, which eventually grew to one of the most prestigious legal schools in the country.<sup>160</sup> He died on September 10, 1845 while he was still serving on the Supreme Court.<sup>161</sup>

#### IV. IMPACT

Justice Story's decisions in *The Anne* relating to neutrality and foreign affairs have been cited in various texts and treatises regarding international law and admiralty law. Justice Story's opinion made it a clear principle that between belligerent nations, when there is an allegation that one side violated neutral territory, it is solely the neutral nation that has the right to suggest that the capture was invalid.<sup>162</sup> Underlying this rule is the premise that because these violations only cause injury to the neutral nation, the neutral nation alone may seek a remedy.<sup>163</sup> In that sense, it echoes principles of tort law, where there is no right to redress unless an injury has occurred.

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<sup>158</sup> R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMEN OF THE OLD REPUBLIC, 200-211 (1985), available at [http://books.google.com/books?id=3oFQf1mfRSIC&pg=PA124&lpg=PA124&dq=Justice+Story+admiralty+decisions&source=bl&ots=JncosSqWfI&sig=R6G5AVGLnO2s2HoHAEBUZToxBKs&hl=en&sa=X&ei=\\_n2TUsj4HdLoAS01IGgBQ&ved=0CFwQ6AEwBw#v=onepage&q=Justice%20Story%20admiralty%20decisions&f=false](http://books.google.com/books?id=3oFQf1mfRSIC&pg=PA124&lpg=PA124&dq=Justice+Story+admiralty+decisions&source=bl&ots=JncosSqWfI&sig=R6G5AVGLnO2s2HoHAEBUZToxBKs&hl=en&sa=X&ei=_n2TUsj4HdLoAS01IGgBQ&ved=0CFwQ6AEwBw#v=onepage&q=Justice%20Story%20admiralty%20decisions&f=false) (last visited Nov. 23, 2013).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See JOHN BASSET MORE & FRANCIS WHARTON, A DIGEST OF INTERNATIONAL LAW: AS EMBODIED IN DIPLOMATIC DISCUSSIONS, 512 (1906) available at <http://books.google.com/books?id=ghEoAAAAAYAAJ&pg=PA512&lpg=PA512&dq=The+Anne+1818+and+neutrality&source=bl&ots=Qe-ksaagwU&sig=1wfJltYrf54qZizKYdSCyC5mP2I&hl=en&sa=X&ei=z4-OUumHF-fJsQT514GACA&ved=0CDkQ6AEwAw#v=onepage&q=The%20Anne%201818%20and%20neutrality&f=false> (last visited Nov. 23, 2013). See also STOCKTON, *supra* note 34 at 399.

<sup>163</sup> *Id.*

Also similar to tort law, it emphasizes the idea of duty, particularly the duty of nations to protect their own sovereignty. Neutral nations had not only a right to protect their territory; they also had a duty to protect others seeking refuge within that territory. A lack of diligence on the part of the neutral nation left the captured nation with no way to seek justice. If all went well and the neutral nation established that the capture was invalid, the duty then shifted to the captor's country to make restitution of the captured property.<sup>164</sup> The neutral nation only has a duty to restore the property when it actually possesses said property.<sup>165</sup> Many years later, the Supreme Court adopted an even stricter rule with respect to neutrality violations. This rule stated that proof of capture in neutral waters was not enough to demand restitution; it must further be shown that there was an intent to violate the neutral territory.<sup>166</sup> However, it is not clear whether this rule remained in effect.

*The Anne* has also been cited for the principle that when a vessel commences hostilities in neutral territory, for whatever reason, she immediately forfeits her right to neutral protection, and not even the neutral nation can seek redress for her capture.<sup>167</sup> Respect for sovereignty is evidence here as well, especially with the no-nonsense approach Justice Story and other writers take to this issue. It was a well-known rule of maritime law that neutral territory was to be completely free of hostilities, with the exception of self defense. To be effective, the rule required strict adherence, and perhaps that is why it was defended so vehemently by Justice

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> See STOCKTON, *supra* note 34 at 399. See also MOORE AND WHARTON, *supra* note 120.

Story. The punishment for such violations was equally harsh, as the captured property was to be immediately returned regardless of who it belonged to.<sup>168</sup>

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<sup>168</sup> *Id.*



## APPENDIX

### D.B. OGDEN - ATTORNEY FOR THE CAPTORS



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Ogden's full name was David Bayard Ogden.<sup>170</sup> Ogden was born in Morrisania, New York on October 31, 1775.<sup>171</sup> Ogden was the eldest of twelve children born to Mrs. Euphemia Morris and Mr. Samuel Ogden.<sup>172</sup> He married Marietta Ogden and they had eight children together.<sup>173</sup> Ogden's uncle, Governor Morris, was a member of the Federalist convention and one of the authors of the final draft of the United States Constitution. It is likely that his uncle's position influenced Ogden's own political affiliations.

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<sup>169</sup> YALE UNIVERSITY ART GALLERY, <http://ecatalogue.art.yale.edu/detail.htm?printable=1&objectId=118> (last visited Nov. 23, 2013).

<sup>170</sup> NEW JERSEY HISTORICAL SOCIETY, <http://www.jerseyhistory.org/findingaid.php?aid=0386> (last visited, Nov. 23, 2013).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

Ogden received a Bachelor of Arts from the University of Pennsylvania in 1792, and then studied law with his uncle, Abraham Ogden.<sup>174</sup> He was admitted to the bar as an attorney in 1796.<sup>175</sup> D.B. Ogden, along with Thomas Ludlow and Ogden and Henry R. Beekman, set up the law practice of Ogden, Beekman, and Ogden in New York City.<sup>176</sup> During his career, Ogden argued a number of cases in front of the United States Supreme Court. He was well liked among the legal community, and despite his intelligence, he remained simple in both his manners and appearance.<sup>177</sup> As a lawyer, he was admired for his ability to make short, yet powerful arguments.<sup>178</sup> He was nicknamed "the sledge-hammer," due in part to his large muscular frame.<sup>179</sup> It has also been said that Ogden had a peculiar habit: it bothered him to see a dog lying down on the street, so whenever he saw one he would go up to it and walk on its tail.<sup>180</sup>

Like his uncle, Ogden was prominent in local politics as a Federalist, and later, as a Whig.<sup>181</sup> He served as a member of the New York State assembly in 1814 and 1838 and as surrogate of New York County from 1840 to 1844.<sup>182</sup> Ogden died of typhus fever on July 16, 1849 in Staten Island.<sup>183</sup>

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> NEW YORK TIMES OBITUARY RECORD, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F60E10FB3E5515738DDDA0894D8415B8485F0D3> (last visited Nov. 23, 2013).

<sup>177</sup> CHARLES EDWARDS, PLEASANTRIES ABOUT COURTS AND LAWYERS OF THE STATE OF NEW YORK, 439 (1867) available at

<http://books.google.com/books?id=UyAbAAAAyAAJ&pg=PA439&lpg=PA439&dq=David+B+Ogden+New+York+lawyer&source=bl&ots=fTkQQZYkos&sig=ig7hINGoBzICs8hYn3HCyDANmOA&hl=en&sa=X&ei=ZUHTUv68I->

[X\\_4AOg6YCwBw&ved=0CEcQ6AEwBA#v=onepage&q=David%20B%20Ogden%20New%20York%20lawyer&f=false](http://books.google.com/books?id=UyAbAAAAyAAJ&pg=PA439&lpg=PA439&dq=David+B+Ogden+New+York+lawyer&source=bl&ots=fTkQQZYkos&sig=ig7hINGoBzICs8hYn3HCyDANmOA&hl=en&sa=X&ei=ZUHTUv68I-X_4AOg6YCwBw&ved=0CEcQ6AEwBA#v=onepage&q=David%20B%20Ogden%20New%20York%20lawyer&f=false) (last visited Nov. 23, 2013).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* This fact was said to have come from one of Ogden's former clerks.

<sup>181</sup> NEW JERSEY HISTORICAL SOCIETY, *supra* note 120.

<sup>182</sup> *Id.*

<sup>183</sup> Find A Grave, <http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GRid=66169076> (last visited, Nov. 23, 2013).